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ground of equity's refusal to decree a vain thing, since the plaintiff might render its order nugatory at will.[19] The trend of the later cases, however, is towards the acceptance of a more reasonable view, that if the contract is equitable the plaintiff should be given the relief demanded, on the principle that his appeal to chancery is a guaranty of his willingness to perform.[20]

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INSURABLE INTEREST IN FIRE AND LIFE POLICIES.—There is no little confusion in the books over the determination of the question as to the extent of the interest which the assured must have in the subject matter of the contract of insurance in order to purge the transaction of the taint of wager and speculation. The question has recently arisen in the case of *Oatman* v. *B. & M. Mut. Fire Relief Assn.* (Ore. 1913) 133 Pac. 1183. The court held that a husband who had insured his wife's property in which he had no rights, could not recover from the insurer when the property was destroyed. The decision is consistent with the better view of the law, inasmuch as in cases of ordinary fire and marine policies the engagement of the insurer is merely to indemnify, the proof of the loss being a condition precedent to recovery on the contract.[1] It does not follow, however, that since there must be interest at the time of the happening of the event against which the policy insures, that in absence of a stipulation to such effect in the policy,[2] the contract is invalid, if the insured has no interest in the property at the time the contract was made.[3] Some of the authorities refuse to sanction this rule, not only on the ground that it would be a wager contract to insure against loss from the destruction of property in which there were no present interest, but also because it would present a strong temptation to destroy the res, and therefore, against public policy.[4] But these arguments are not sound, when it is remembered that the assured cannot enforce the contract, unless he shows that he had acquired an interest in the property before its destruction, for otherwise, he has suffered no loss.

The cases are no more harmonious in stating how great the interest at the time of the accident must be to warrant a recovery. While the

[19]Rust *v.* Conrad (1882) 47 Mich. 449; Ulrey *v.* Keith (1908) 237 Ill. 284.

[20]Phila. Ball Club *v.* Lajoie (1902) 202 Pa. 210; McCall Co. *v.* Wright (1910) 198 N. Y. 143. The last cited case was based on a bill for injunction, and the court limited the doctrine of Dockstader *v.* Reed, *supra,* to bills for specific performance.

[1]Hartford Fire Ins. Co. *v.* Keating (1897) 86 Md. 130, 143; Castellain *v.* Preston (1883) L. R. 11 Q. B. D. 380; Carter *v.* Humboldt Fire Ins. Co. (1861) 12 Ia. 287.

[2]If an interest at the time of the inception of the contract is made part of the policy it is material to the insurer's undertaking. And it is obvious that he can stipulate that he shall not be bound unless an interest did exist. See Howard *v.* The Lancashire Ins. Co. (1885) 11 Can. S. C. 92.

[3]Marine Boston Ins. Co. *v.* Globe Fire Ins. Co. (1899) 174 Mass. 229; Fire Sun Ins. Office of London *v.* Merz (1899) 64 N. J. L. 301.

[4]Ohio Farmers Ins. Co. *v.* Vogel (1903) 30 Ind. App. 281; Clinton *v.* Norfolk M. Fire Ins. Co. (1900) 176 Mass. 486; Carpenter *v.* Providence Wash. Ins. Co. (1842) 16 Pet. 495, 503; Sadler's Co. *v.* Badcock (1743) 2 Atk. 554.

earlier decisions showed a tendency to demand proof of a clear and vested pecuniary interest,[5] the inclination of the modern view is to relax the stringency of this rule and to admit protection where there is a reasonable probability of a pecuniary advantage.[6] Certainly it is settled that the assured need not have title or possession.[7]

From the foregoing rules it is clear in case of insurance on property the insurer's liability can be determined on the ordinary rules of contracts. And the true reason for denying recovery in favor of the assured, when he had no interest in the property at the time it was destroyed, is not that there is a wager contract, but because the undertaking of the defendant is merely to save the plaintiff harmless from what loss he should suffer.[8]

In contra-distinction to the cases of fire and marine insurance, a contract upon the life of an individual is not indemnatory in its nature.[9] Since nothing is more certain than death, a life insurance policy is a contract to pay a definite sum on the happening of a certain event. Consequently, there is no element of wager. Nevertheless, because of public policy in obviating an incentive to the commission of crime, the law requires that there be an interest in the life of the person upon whose death the policy is payable.[10] The basis of this doctrine is that good faith on the part of the contracting parties is essential. And in establishing a practical criterion for its ascertainment the courts have drawn the line at pecuniary interest.[11] Since proof of death, and not proof of loss, is the essence of the insurer's liability on the contract, a pecuniary interest is necessary only at the inception of the contract.[12] There is no difficulty, therefore, in enforcing the agreement according to its terms, although the interest in the

[5]McCarty *v.* Com. Ins. Co. (1841) 17 La. 365; May, Insurance (4th ed.) § 76; see Doyle *v.* Amer. Fire Ins. Co. (1902) 181 Mass. 139.

[6]Home Ins. Co. *v.* Mendenhall (1897) 164 Ill. 458; Sawyer *v.* Dodge M. Ins. Co. (1875) 37 Wis. 503, 542; Fenn *v.* New Orleans M. Ins. Co. (1875) 53 Ga. 578; see McCutcheon *v.* Ingraham (1889) 32 W. Va. 378.

[7]Hanover Fire Ins. Co. *v.* Bohn (1896) 48 Neb. 743; Berry *v.* A. C. Ins. Co. (1892) 132 N. Y. 49; W. & A. Pipe Lines *v.* Home Ins. Co. (1891) 145 Pa. 346; see Hooper *v.* Robinson (1878) 98 U. S. 528. So a mortgagor has sufficient interest. Insurance Co. *v.* Stinson (1880) 103 U. S. 25. Some courts have gone so far as to hold that an heir expectant has an insurable interest. Home Ins. Co. *v.* Mendenhall, *supra;* but see Lucena *v.* Crauford (1806) 2 B. & P. 75.

[8]The same rules are applicable to "valued" policies. Here the parties stipulate for a liquidated sum as damages if the assured suffers loss. There is no more contravention of public policy in enforcing this liquidation of damages than in the ordinary cases of contracts. Phœnix Ins. Co. *v.* McLoon (1868) 100 Mass. 475.

[9]Mut. Life Ins. Co. *v.* Allen (1884) 138 Mass. 24; Scott *v.* Dickson (1884) 108 Pa. 6; Emerick *v.* Coakley (1871) 35 Md. 188; Dalby *v.* Life Assur. Co. (1854) 15 C. B. 364.

[10]Rombach *v.* Ins. Co. (1883) 35 La. Ann. 233; see Reed *v.* Provident etc. Soc. (1907) 190 N. Y. 111.

[11]The courts take a very liberal attitude in ascertaining the extent of the interest. It is sufficient if a pecuniary advantage is reasonably to be expected. Barnes *v.* London, Edinburgh & Glasgow L. Ins. Co. (1892) L. R. 1 Q. B. 864; Reserve Mut. Ins. Co. *v.* Kane (1876) 81 Pa. 154.

[12]Dalby *v.* Life Assur. Co., *supra;* see Ins. Co. *v.* Bailey (1871) 13 Wall. 616.

life insured had lapsed before death.[13] But the question becomes important in determining the rights of three persons concerned in these contracts: the one who takes out the insurance, the beneficiary, and the assignee of the policy.

In determining whether the one who takes out the policy has a sufficient interest the problem is peculiarly perplexing by reason of the varied classes of cases. But the requirement is stringent that the policy holder must have such an interest in the life insured, so that he would derive a pecuniary benefit from its preservation.[14] Where one insures his own life the interest is present, since everyone is conclusively presumed to have an interest in his own life.[15] The courts also universally accede to the proposition that a creditor has a pecuniary interest in the continuance of the debtor's life;[16] and the rule of pecuniary interest is not suspended even where one insures the life of a blood relative.[17] But where one has a legal right to the services or support of a person, there is a presumption that the pecuniary interest is present.[18] Whether the presumption is conclusive, however, is a mooted question.[19]

Inasmuch as the assured has an interest in his own life he may name whom he pleases as his beneficiary; and there is no necessity of interest on the part of the latter.[20] But the courts should not hesitate, on principle, to examine the circumstances under which the contract was made, to discover whether the nominal beneficiary was really the assured. This would merely test the existence of good faith.[21] It has recently been held that where the assured deserted his wife and lived with another woman, making the latter the beneficiary of his insurance policy, she was entitled to the proceeds regardless of the question of interest in his life. *M. B. Life Ins. Co.* v. *Cummings* (Ore. 1913) 133 Pac. 1169.

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[13]Conn. Mut. Life Ins. Co. *v.* Schaefer (1876) 94 U. S. 457.

[14]8 COLUMBIA LAW REVIEW 664.

[15]Fidelity M. L. Assn. *v.* Jeffords (C. C. A. 1901) 107 Fed. 402.

[16]While acknowledging an insurable interest in the creditor, the courts differ as to the amount recoverable on the policy. By some the full amount of the policy may be recovered. See 6 COLUMBIA LAW REVIEW 449. But others hold that under no circumstances can more than the debt with interest and the premiums paid be recovered. See Exchange Bank of Macon *v.* Loh (1898) 104 Ga. 446. The sound view would seem to be, however, that only the debt and the premiums paid may be recovered where the amount of the policy is unreasonably disproportionate to the debt, since the creditor has not met the requirement of good faith. Although logically this would bar any recovery by the creditor on the policy because the contract is void at its inception, he is permitted to get the amount of his debt and premium paid. Cammack *v.* Lewis (1872) 15 Wall. 643; Rittler *v.* Smith (1889) 70 Md. 261; Grant's Adm'rs. *v.* Kline (1887) 115 Pa. 618.

[17]Guardian M. L. Ins. Co. *v.* Hogan (1875) 80 Ill. 35; Lewis *v.* Phœnix M. L. Ins. Co. (1872) 39 Conn. 100; Halford *v.* Kymer (1830) 10 B. & C. 725.

[18]Currier *v.* Ins. Co. (1885) 57 Vt. 496; May, Insurance (4 ed.) § 107 C.

[19]See Richards, Insurance (3 ed.) § 35.

[20]Union Frat. League *v.* Walton (1899) 109 Ga. 1; Robinson *v.* U. S. etc. Assn. of N. Y. (C. C. 1895) 68 Fed. 825; *contra,* Gilbert *v.* Moose (1883) 104 Pa. 74.

[21]See Home Ins. Co. *v.* Mendenhall, *supra.*

The same principles applicable to the rights of the beneficiary should govern the rights of the assignee of the policy. The assignee need not have an interest in the life of the assured.[22] But obviously if the assured takes out the policy under circumstances which manifest a want of the indispensable good faith, the contract would be vitiated, and the assignee could have no rights against the insurer. It does not follow, however, that the assignment between the parties thereto is also invalid. Consequently, on principle, if the insurer voluntarily pays the amount of the policy, as between the assignor, or his personal representative, and the assignee, the latter should prevail. Some courts, however, in endeavoring to adjust the rights of the assignor and assignee, have declared that an assignee must have an insurable interest.[23] This mistake led the Supreme Court to make a dictum to this effect in *Warnock* v. *Davis*,[24] and some courts have followed this misconception. But in *Grigsby* v. *Russell*,[25] decided in 1911, the court places itself in line with the weight of authority in holding that it is not necessary for an assignee to have any interest in the life of the assured.

It would seem that the confusion on the question of insurable interest can be found in the failure of the courts to recognize that in cases of life insurance the recovery must be founded on good faith, at the inception of the contract, as tested by pecuniary interest; whereas, in insurance on property the recovery is conditioned upon proof of loss, which only necessitates an interest in the property at the time it is destroyed.

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[22]While the policy taken out by the insured for purposes of assigning to one without an interest would not be upheld on the theory of the old common law, see 6 COLUMBIA LAW REVIEW 592, yet by Act of 1867, (30, 31 Vict. c. 144), it was made so assignable. In America, the majority rule is that it is a chose in action and freely assignable. Steinback *v.* Diepenbrock (1899) 158 N. Y. 24; Fitzpatrick *v.* Hartford L. & A. Ins. Co. (1888) 56 Conn. 116; Grigsby *v.* Russell (1911) 222 U. S. 149; but see Ala. etc. Ins. Co. *v.* Mobile M. Ins. Co. (1886) 81 Ala. 329; Metr. Life Ins. Co. *v.* Elison (1905) 72 Kan. 199.

[23]Gilbert *v.* Moose, *supra;* Ala. Ins. Co. *v.* Mobile M. Ins. Co., *supra;* Metr. Life Ins. Co. *v.* Elison, *supra;* Basye *v.* Adams (1883) 81 Ky. 368; Schonfield *v.* Turner (1889) 75 Tex. 324.

[24](1881) 104 U. S. 775.

[25]Note 22, *supra.*